

**[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED  
COMPLAINT**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION CORPORATION,  Plaintiff-Applicant,  v.  BERNARD L. MADOFF INVESTMENT SECURITIES LLC,  Defendant.	Adv. Pro. No. 08-01789 (SMB)  SIPA LIQUIDATION  (Substantively Consolidated)
In re: BERNARD L. MADOFF,  Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,  Plaintiff,  v.  J. EZRA MERKIN, GABRIEL CAPITAL, L.P., ARIEL FUND LTD., ASCOT PARTNERS, L.P., ASCOT FUND LTD., GABRIEL CAPITAL CORPORATION,  Defendants.	Adv. Pro. No. 09-01182 (SMB)

**[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTIONS TO DISMISS THE THIRD AMENDED COMPLAINT**

On October 11, 2013, Defendants J. Ezra Merkin and Gabriel Capital Corporation (the “Merkin Defendants”), Ariel Fund Ltd. (“Ariel”), Gabriel Capital L.P. (“Gabriel”), and Ascot Partners (“Ascot”) (together, the “Defendants”) filed three motions, ECF Nos. 160, 164, 168, and memoranda and declarations in support, ECF Nos. 161, 162, 166, 167, 169, to dismiss the third amended complaint (“Third Amended Complaint”) of Plaintiff Irving H. Picard, as trustee (“Trustee”) for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C.

§§ 78aaa *et seq.*, and the estate of Bernard L. Madoff, individually, filed on August 30, 2014. EFC No. 151.

The Trustee opposed the motions to dismiss on November 15, 2013. ECF No. 173. On December 20, 2013, the Merkin Defendants, Ariel, Gabriel, and Ascot filed replies and a declaration in support of their respective motions to dismiss. ECF Nos. 185, 186, 187, 188.

On December 20, 2013, Defendant Ascot Fund Ltd. (“Ascot Fund”) filed its motion to dismiss the Third Amended Complaint and to sever, and a declaration and memorandum of law in support (together, with the prior motions to dismiss, the “Motions to Dismiss”). ECF Nos. 182, 183, 184. On December 23, 2013, the Court entered a stipulation between the Trustee and Ascot Fund ordering the dismissal of Counts One through Eight of the Third Amended Complaint only insofar as they seek recovery of Initial Transfers from Ascot Fund. ECF No. 189. On January 31, 2014, the Trustee filed an opposition to Ascot Fund’s motion to dismiss and a supporting declaration. ECF Nos. 198, 199. On February 28, 2014, Ascot Fund filed its reply and declaration in support of its motion to dismiss. ECF Nos. 205, 206.

On April 30, 2014, the Motions to Dismiss were heard by the Honorable Stuart M. Bernstein. During the April 30th hearing, the Court denied Ascot Fund’s motion to sever from the bench. On August 12, 2014, the Court entered a Memorandum Decision Granting in Part and Denying in Part Defendants’ Motion to Dismiss (the “Decision”), ECF No. 212, that: (1) dismissed Count One, preferential transfers against Ascot; (2) dismissed Count Three, Two-Year Constructive Fraudulent Transfers against Gabriel, Ariel, and Ascot; (3) dismissed Counts Four through Eight, Six-Year Fraudulent Transfers against Gabriel, Ariel, and Ascot; (4) dismissed Count Eleven, Disallowance; (5) dismissed Count Twelve, Equitable Disallowance; (6) sustained Count Two, Two-Year Actual Fraudulent Transfers; (7) sustained Count Nine, Subsequent

Transfers; (8) sustained Count Ten, General Partner Liability; and (11) sustained Count Thirteen, Equitable Subordination. On August 14 and 20, 2014, the Court issued two errata orders. ECF Nos. 213, 215.

On September 5, 2014, the Trustee moved for: (1) certification pursuant to Federal Rule of Civil Procedure 54(b), made applicable to this adversary proceeding by Rule 7054 of the Federal Rules of Bankruptcy Procedure, for entry of final judgment on Counts One, Three, Four, Five, Six, Seven, and Eight; and (2) certification of the portions of this Order directing entry of final judgment for immediate appeal to the United States Court of Appeals under 28 U.S.C. § 158(d)(2). ECF No. 227. The motion was opposed by the Defendants and denied by the Court on December 4, 2014. ECF Nos. 230, 231, 246.

For the reasons set forth in the Court's August 12, 2014 Decision, which is incorporated herein and made a part hereof, it is hereby **ORDERED** that:

1. As to Counts One (preferential transfers against Ascot); Count Three (Two-Year Constructive Fraudulent Transfers against Gabriel, Ariel, and Ascot); Counts Four through Eight (Six-Year Fraudulent Transfers against Gabriel, Ariel, and Ascot); Count Eleven (Disallowance); and Count Twelve (Equitable Disallowance), the Motions to Dismiss are **GRANTED**;

2. As to Count Two (Two-Year Actual Fraudulent Transfers); Count Nine (Subsequent Transfers); Count Ten (General Partner Liability); and Count Thirteen (Equitable Subordination), the Motions to Dismiss are **DENIED**;

3. All Defendants must file their answers to the Third Amended Complaint within 20 days of entry of this order.

4. All Defendants and the Trustee must comply with Fed. R. Civ. P. 26(f) and schedule a conference with the Court no later than 60 days from entry of this order.

Dated: December \_\_\_, 2014  
New York, New York

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HON. STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE